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In the

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 691

OSCAR R. BOLTON and LILLY BOLTON,
Appellants.

v.

BOROUGH OF SCHUYLKILL HAVEN,
Appellee.

On Appeal From the Superior Court
of Pennsylvania.

JURISDICTIONAL STATEMENT

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January 26, 1961.

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Case Caption

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

OSCAR R. BOLTON and LILLY BOLTON,
Appellants,

v.

BOROUGH OF SCHUYLKILL HAVEN,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the Superior Court of Pennsylvania is reported at 190 Pa. Superior Ct. 157. (Appendix A, infra, p. 11a). The opinion of the trial court is not reported. (Appendix A, infra, p. 1a).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

This is a civil action to recover a penalty, for alleged violation of Ordinance No. 321 of the Borough of Schuylkill Haven, a Pennsylvania municipality.

The appeal brings up for review the judgment of the Superior Court of Pennsylvania entered on August 10, 1959. Allocatur was refused by the Supreme Court of Pennsylvania on November 25, 1959. Notice of Appeal to this Court was filed in the Supreme Court of Pennsylvania on February 23, 1960.

Thereafter, a question arose as to the jurisdiction of the Superior Court of Pennsylvania over the subject matter of the action. On April 20, 1960, CHIEF JUSTICE JONES of the Supreme Court of Pennsylvania signed an Order of Enlargement extending the time to docket the Appeal "until the expiration of sixty days from the date of final deterimnation by the Supreme Court of Pennsylvania of the jurisdictional validity of the judgment of the Superior Court appealed from." Despite repeated requests, the Supreme Court of Pennsylvania has declined to make any definite determination of the jurisdictional question. The latest order of the Supreme Court of Pennsylvania declining to rule on the jurisdictional question was entered on December 6, 1960.

Jurisdictional Statement

The appeal to this Court involves the constitutional validity, under the stipulated facts, of two municipal ordinances. The appeal jurisdiction of this Court is based on 28 U.S.C. Section 1257 (2), in that the validity of the ordinances is drawn into question on the ground of their repugnancy to the Constitution of the United States, and the decisions of the trial court and of the Superior Court of Pennsylvania were in favor of their validity. A municipal ordinance is a "statute" within the meaning of 28 U.S.C. Section 1257 (2). **JAMISON v. STATE OF TEXAS**, 63 S. Ct. 669, 318 U.S. 413, 87 L. Ed. 869; **JOHN P. KING MFG. CO. v. CITY COUNCIL OF AUGUSTA**, 48 S. Ct. 489, 277 U.S. 267, 73 L. Ed. 801.

In the alternative, pursuant to 28 U.S.C. Section 2103, the certiorari jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), in that rights, privileges and immunities guaranteed by the Fourteenth Amendment have been specially set up and have been denied.

ORDINANCES INVOLVED.

The Ordinances asserted to be invalid as applied to the facts of this case are ORDINANCES Nos. 321 and 333 of the Borough of Schuylkill Haven. Their relevant parts are printed in Appendix B, infra pp.

The two Ordinances were construed by the trial court to be in pari materia, and it was stipulated at trial that compliance with the latter Ordinance (No. 333) is required before the citizen is permitted to comply with Ordinance No. 321.

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED.

Ordinance No. 321 requires compulsory connection, under duress of fine or imprisonment, to a sewer system leased by the Borough but owned by a third party. It was stipulated at trial that this Ordinance was adopted pursuant to a bargain to do so made with the owner-lessor of the system, and for the specific purpose of taking the money of abutting property owners without their voluntary consent through the collection of sewer rentals and applying the same to the payment of the lessor-owner's bonded debt. A companion Ordinance No. 333 requires the abutting property owner to sign a contract for sewer service before making any connection. It was further stipulated at trial that compliance with this condition precedent is required even in the case of a compulsory connection.

The questions presented are:

1. Is Ordinance No. 321 repugnant to the Fourteenth Amendment, in view of the stipulated facts that it was adopted pursuant to a bargain with a third party to do so and for the specific purpose of taking the abutting owners' money without their voluntary consent and applying the same to the use of the other party to the bargain?

2. Does the Fourteenth Amendment permit a municipality to compel a citizen, under duress of fine or imprisonment, to express contractual con-

sent to buy and pay for utility services forced upon him?

3. If not, is the duty of connection imposed by Ordinance No. 321 clogged with an unconstitutional condition precedent by Ordinance No. 333 and the administrative practice of the municipality?

STATEMENT OF THE CASE.

The Borough of Schuylkill Haven leased a sewer system owned by the Schuylkill Haven Municipal Authority. The Authority is a separate and distinct corporation. Under the terms of the lease, the Borough agreed to collect sewer rentals from the users of the sewer, and, after payment of operating and administrative expenses, to apply the net revenues to the payment of the lessor's bonded debt.

The lease also contained an express agreement by the Borough to compel all abutting owners to connect with the sewer.

It was stipulated in the trial court that the compulsory connection Ordinance No. 321 was adopted to carry out this bargain, and that it was adopted for the specific purpose of taking the money of the abutting owners without their voluntary consent and applying the same toward the payment of the lessor's bonded debt.

A later ordinance, No. 333, requires the abutting owner to take out a permit and sign a contract for sewer service before making any connection. It was stipulated in the trial court that this condition precedent must be complied with even in the case of a compulsory connection. In its administrative practice the Borough requires the owner to sign a document which purports on its face to be a "Contract for Sewerage Service," which contains an agreement by the owner to

pay for the service and which must be signed by both parties before it becomes effective.

The Borough sent a "Notice to Connect" to the appellants. This Notice specifically referred to Ordinance No. 333, and informed the appellants that:

> "When you secure your connection permit you contract to abide by the Rates, Rules and Regulations adopted by the Borough Council."

Upon Appellants' failure to connect with the sewer, suit was brought against them to collect the penalty for non-connection provided by Ordinance No. 321. The suit resulted in a judgment against the appellants entered in the Court of Common Pleas of Schuylkill County, Pennsylvania. On Appeal to the Superior Court of Pennsylvania the judgment was affirmed.

(HOW THE FEDERAL QUESTIONS WERE RAISED.)

The Federal questions were initially raised in the Appellants' pleading in the trial court. The pleading (Transcript, p. 23 et seq.) set forth the bargain between the Borough and the Authority, the genesis of Ordinance No. 321 and the purpose for which it was adopted. Defense was made, inter alia, on the grounds that (1) Ordinance No. 321 was not a constitutionally valid exercise of the police power in view of its origin and purpose; and (2) That Ordinance No. 333 had

clogged the duty imposed by the earlier Ordinance with an unconstitutional requirement that the owner express contractual consent to a transaction forced upon him. Specific reliance was placed upon the Fourteenth Amendment to the Constitution of the United States. See, inter alia: Transcript, p. 32, par. (c); pp. 14-15, par. (q); p. 15, par. (s).

The Federal questions were further pressed by requests for charge (see inter alia, Transcript, p. 72, par. 3; p. 73, par. 14; p. 74, pars. 15, 16, 17; p. 75, par. 24; p. 76, pars. 28, 30.), all of which were refused. (Transcript, pp. 70, 71).

The Federal questions were still further pressed on a motion for judgment n. o. v. and were overruled in the opinion of the trial court. See Appendix A, infra, p. 7a.

The Federal questions were renewed on appeal to the Superior Court of Pennsylvania and were overruled in the opinion of that Court, See Appendix A, infra, pp. 14a to 18a.

THE APPEAL PRESENTS SUBSTANTIAL FEDERAL QUESTIONS.

1. The issue in this case is not the academic question whether a municipality may compel sewer connections in the exercise of the police power *in good faith.*

The question here is whether due process of law, guaranteed by the Fourteenth Amendment, will permit a municipality to make a bargain with a third party to use the municipality's police power as an instrument for taking a citizen's money without his consent and applying it to the use of the other party to the bargain.

The issue is clear cut on the stipulations made in the record. See Transcript, pp. 52-56, pars. 14-21. The origin of the Ordinance and its money-raising purpose were flatly admitted. In addition to that, the record also shows that the Ordinance is actually being used as an instrument for extorting money on a wholesale scale. It was stipulated of record (Transcript, pp. 59, 60, pars. 29, 30) that 219 property owner have taken out permits, signed contracts, paid connection charges and are paying sewer rentals *although their properties are not physically connected with the sewer system,* and that the Borough has adopted a "policy" of withholding legal action against such owners, while proceeding against "non-cooperative abutting owners."

It is fundamental that the police power must be strictly confined to its legitimate object. It cannot be employed as a substitute for taxation, nor as a means of taking the property of one man without his consent and giving it to another. It is universally agreed that an exercise of the police power *must be in good faith,* and it cannot be made a cloak under which to overthrow or disregard constitutional rights; property rights cannot be invaded under the pretense of protecting the public health. **6 McQUILLAN, MUN. CORP., SECTION 24.09.** Laws enacted in the exercise of the police power must be such in fact, and the rights of property cannot be invaded under the guise of police regulations, when it is manifest that such is not the object thereof. **ROAD IMPROVEMENT DISTRICT NO. 7 v. ST. LOUIS-SAN FRANCISCO R. CO.**, 28 F. 2d 825, 827.

This Court has squarely recognized that an ordinance purporting to be a police regulation is invalid if it is adopted for an improper purpose, particularly where it is the fruit of a bargain with a third party and adopted for the financial benefit of the third party. In **DOBBINS v. CITY OF LOS ANGELES**, 195 U.S. 223, 49 L. Ed. 169, this Court reversed the action of a State court in dismissing a bill of complaint which alleged that an industrial zoning ordinance had been instigated by a competitor of plaintiff and had been adopted as a result of a conspiracy between the city and the competitor to protect the competitor in the enjoyment of a monopoly.

In DOBBINS, this Court said at 195 U.S. 236:

> ". . . it is now thoroughly settled by decisions of this Court that municipal by-laws and ordinances . . . are subject to investigation in the Courts with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitarary interference with . . . constitutional rights . . ."

In the present case, the Superior Court of Pennsylvania conceded that ". . . a legislative enactment designed solely or even principally for the purpose of producing revenue cannot be justified as a valid exercise of the police power." Despite that concession, it sustained the compulsory connection Ordinance No. 321 as a valid police regulation on the ground that the Borough had statutory authority to impose a charge for the use of the sewer. The fallacy of the reasoning is obvious. It is equivalent to saying: "The police power may not be used solely or even primarily for the purpose of raising revenue. But the Borough does have power to charge for the use of the sewer. Therefore, the Borough may compel connections with the sewer for the sole purpose or even the primary purpose of taking the money of the abutting owners without their consent and applying it for the benefit of the lessor-owner of the sewer."

No decision of this Court has ever sanctioned the use of the police power for the admitted pur-

pose of taking the money of one man and giving it to another.

It is respectfully submitted that the facts and stipulations of this case show a clear-cut attempt to use the police power for the inadmissible purpose of taking property without due process of law in violation of the Fourteenth Amendment.

2. In addition to the foregoing, the case presents the further important constitutional questions whether a municipality may compel a citizen, under duress of fine or imprisonment, to *to express contractual consent* to pay for utility services forced upon him, before he is even permitted to make the required compulsory connection; and whether he may be punished for non-connection if he refuses to express *contractual consent.*

The significance of this feature of the case lies in the fact that under the decisional law of the State, as enunciated by the Supreme Court of Pennsylvania in **HAMILTON'S APPEAL,** 340 Pa. 17, and **MANHEIM TWP. SUPERVISORS v. WORKMAN,** 350 Pa. 168, 173, sewer charges "are based upon contract rather than taxation because those who . . . receive the service act in so doing *voluntarily.*" To the same effect, is **CARSON v. SEWER COMMISSIONERS,** 182 U.S. 398, 403, 45 L. Ed. 1151, 1154.

The undisputed fact of this case is that Ordinance No. 333 requires the property owner to sign

a contract for sewer service before making any connection, and that in the practical administration of the Ordinance the Borough requires every owner—even those who act under *compulsion*—to sign a document purporting to be a "Contract For Sewerage Service," and which contains an express promise by the owner to pay for the service forced upon him. This document is obviously intended to serve as a colorable foundation for collecting the charges imposed.

This requirement, as applied to a compulsory connection, is not only a violation of liberty of contract, but in a very real sense is a violation of freedom of speech. In **WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE,** 319 U.S. 624, 87 L. Ed. 1628, this Court held that freedom of speech includes not only a mans' right to speak his mind, but also to *refuse to speak* what is *not* in his mind. It is difficult to imagine a more flagrant instance of compelling a man to speak what is not in his mind, when he is forced under threat of fine or imprisonment, to express *contractual consent* to a transaction forced upon him. If the Borough can do this, and then turn about and collect sewer charges from the citizen on the theory that he contracted and agreed to pay them, then due process of law, liberty of contract and freedom of speech have become empty words.

Appellants respectively submit that a municipality has no power to clog its Ordinances with conditions such as this, which require the citizen to relinquish rights guaranteed by the Federal Constitution before he can comply with the Ordinance.

CONCLUSION

The questions herein presented are substantial and of public importance. They immediately affect not only the present appellants but also hundreds of other property owners in the Borough of Schuylkill Haven. The affirmance by the Courts of Pennsylvania have deprived appellants of rights guaranteed to them by the Fourteenth Amendment.

Respectfully submitted,

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January 26, 1961.

Opinion (Schuylkill County Common Pleas)

APPENDIX A

IN THE COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY

Borough of Schuylkill Haven,
Plaintiff,
vs.
Oscar R. Bolton and Lilly Bolton,
Defendants.

No. 654, September Term, 1954.

OPINION OF THE COURT

CURRAN, J.

The Schuylkill Haven Municipal Authority constructed a sewer system in the Borough of Schuylkill Haven, and after completion leased the system to the Borough under a Contract and Lease Agreement dated April 1, 1950. Since that time the Borough has operated and maintained the sewer system. On April 4, 1950, the Borough enacted Ordinance No. 321, compelling owners of improved property to connect with the sewer and providing a penalty for failure to comply with the provisions of the ordinance. On October 8, 1951, the Borough enacted Ordinance No. 333, requiring owners to secure a permit for connection, sign a contract for sewer service and pay a connection charge before connecting to the sewer. Defendants refused to connect to the sewer and the Borough instituted an action

against them before a Justice of the Peace on August 17, 1954, for violation of the ordinance. The Justice of the Peace entered judgment in favor of the Borough and defendants were allowed an appeal to this Court.

After many preliminary arguments during the pleading stage, the case finally came to issue and was tried before a jury. The jury made two special findings of fact — (1) that the sewer system of the Borough of Schuylkill Haven was available to the property of the defendants, Oscar R. and Lilly Bolton, for connection thereto on March 5, 1954, and (2) that the property of the defendants, Oscar R. Bolton and Lilly Bolton, was not connected to the sewer system of the Borough of Schuylkill Haven ninety (90) days after March 5, 1954, and entered a general verdict in the amount of Thirty Dollars ($30.00) in favor of the Borough and against the defendants. Thereupon, the defendants filed motions in arrest of judgment, for judgment non obstante veredicto and for a new trial. The motion in arrest of judgment has been abandoned.

In support of the motion for judgment n. o. v., the defendants advanced three reasons based on the evidence and the pleadings and seven reasons based on the constitutionality of the ordinances. The three reasons based on the evidence and the pleadings are:

1. The plaintiff failed to prove the existence of a lateral as defined in the ordinance.

2. The facts proved were not pleaded.
3. There was no proof that notice to connect had been given by anybody authorized to speak for the borough.

These reasons are all closely related and can be discussed together.

It must be remembered, that in considering a motion for judgment n.o.v., we must read the testimony and all of the inferences reasonably deducible therefrom in a light most favorable to the plaintiff (having obtained the verdict) and all conflicts must be resolved in its favor: Koehler v. Schwartz, 382 Pa. 352, 115 A. 2d 155; Beatty v. Hoff, 382 Pa. 173, 114 A. 2d 173; Coradi v. Sterling Oil Co., 378 Pa. 68, 105 A. 2d 98; Van Buren v. Eberhard, 377 Pa. 22, 104 A. 2d 98; Albert v. Schenley Auto Sales, Inc., 375 Pa. 512, 100 A. 2d 605.

Section 2 of Ordinance No. 321 provides as follows:

"Section 2. As the Sewer System is constructed and sewer service becomes available, each and every owner of improved property in the Borough of Schuylkill Haven abutting on or adjoining any street, alley, lane or other public highway in which there is a sewer, is hereby required to connect his, her or its premises with the Sewer System but only upon receipt of due notice from the Borough to so connect."

In pursuance of the provisions of this Section, the Borough sent the defendants notice to connect to the sewer, which they have refused to do. This notice was signed by R. H. Byers, the then president of the Borough Council, and defendants admit receiving the notice. However, they contend that the ordinance did not authorize the Borough Council to give the notice and that the president could only be authorized to sign or give such notice by ordinance or resolution, and in the absence of proof of such ordinance or resolution the notice is meaningless. Section 1202 of the Borough Code (53 P.S. 46202) provides that the powers of the borough shall be vested in the corporate officers. Section 111 of the Code (53 P.S. 45111) defines corporate officers as follows:

> "'Corporate authorities' or 'corporate officers' means the borough council even though the action taken is by ordinance which is subject to the approval or veto of the burgess."

Thus, under the terms of the ordinance and in accordance with the provisions of the Borough Code, the Borough Council was authorized to give this notice. And, the notice is not meaningless because no ordinance or resolution specifically authorizing the president of council to sign the notice was offered in evidence. This signing or giving of notice as required by the ordinance was a purely ministerial duty properly carried out by the president. Compare Commonwealth v. Nat. Bank, 9 Pa. Super. 118, wherein the Court held that the signing of a warrant in payment of a debt incurred in the ordinary business affairs of

the borough was a ministerial duty and was properly signed by the president of the council.

There is no question that a lateral was laid to the defendants' property. The defendants admit that, but they contend it was laid to the curb line of the adjoining vacant lot acquired by defendants by separate deed and was not laid to their improved property as required by the ordinance. The defendants further contend that the plaintiff never pleaded their ownership of this adjoining vacant lot to which the lateral was laid, thereby causing a variance between proof and pleading. These contentions are without merit. At a pre-trial conference it was stipulated and agreed on the record as follows:

> "It is agreed, as to Paragraph 3 of the complaint, that the defendants are the owners of real estate situate in the Borough of Schuylkill Haven, by virtue of a deed dated October 5, 1940, and recorded in the office for the recording of deeds in and for the County of Schuylkill in Deed Book No. 623, page 27, and that they are the owners of an adjoining piece of property by virtue of a deed dated July 21, 1950, and recorded in the office for the recording of deeds in and for the County of Schuylkill in Deed Book No. 796, page 32. It is further agreed that the premises described in said two deeds are the premises known as 309 Saint Peter Street in the Borough of Schuylkill Haven.
>
> It is further agreed that there is a house on the above described land occupied by the de-

fendants, Oscar R. Bolton and Lilly Bolton, and that house is known as 309 Saint Peter Street."

We cannot now allow the defendants to repudiate that stipulation. It clearly enters the allegations of paragraph 3 of the complaint onto the record as an admission in accordance with the stipulation and results in complete agreement between the allegata and probata. This stipulation also binds the defendants on their contention that a lateral was not laid to their improved property. By this stipulation the lots described in both deeds were joined as one piece of improved property owned by defendants and known as 309 Saint Peter Street. In addition to that, the record reveals testimony indicating that the lateral was laid at its position to the curb line of the adjoining lot at the request and direction of defendants for the sake of convenience of connection for them. They told one of plaintiff's employees where to lay the lateral and the employee marked the spot with green paint. At the outset of the trial, the jury was given the opportunity to view the premises and they saw the condition of the defendants' property, the actual location of the lateral, the green mark on the curb and by means of a dye test the actual connection of the lateral with the main sewer. They also were able to see that the defendants had not connected to the lateral. It was for the jury to determine as a question of fact whether this lateral was made available to defendants' property, and they

did so determine adversely to defendants. We have no reason to disturb or dispute that finding.

The reasons advanced against the constitutionality of the ordinances are as follows:

1. Ordinance No. 321 is vague.
2. Ordinance No. 321 is incomplete and incapable of execution.
3. Ordinance No. 321 denies equal protection of the laws.
4. Ordinance No. 321 denies due process of law.
5. The ordinance violates the police power because it is clearly for the purpose of raising revenue.
6. The compulsory connection provisions of Ordinance No. 321 were repealed by implication by Sections 1 and 6 of Ordinance No. 333.
7. The two ordinances deny freedom of speech and liberty of contract and take property without due process of law.

As to the sixth reason, this Court previously held to the contrary in an opinion dated February 4, 1955, and we now reaffirm that view. As to the other reasons assigned, we have read these two ordinances in their entirety, we have examined the cases relied upon by defendants and plaintiff in support of their respective positions, we have read and considered the arguments proposed by both parties, and after full and complete inquiry we believe it sufficient to say we find both of these ordinances to be constitutional. The

cases cited by defendants do not encompass the facts here involved or bear comparison in principle and merit no further discussion. The motion for judgment n.o.v. is overruled.

In support of their motion for a new trial defendants assign the following reasons:

1. That the Court erred in admitting into evidence the notice to connect.
2. That the Court erred in admitting into evidence a completion certificate.
3. That the Court erred in refusing to strike out the evidence relating to the adjoining lot.
4. That the Court erred in excluding certain admissions stipulated at a pre-trial conference.
5. That the Court erred in excluding paragraphs 12 to 20 of defendants' New Matter as stipulated and admitted.
6. That the Court erred in excluding paragraphs 29 and 30 of defendants' New Matter as stipulated and admitted.

We have already discussed the objection relating to the notice to connect and held that the notice was properly given and therefore was properly admitted into evidence.

The completion certificate objected to (reason number 2) was issued by the Consulting Engineer for the Schuylkill Haven Municipal Authority.

The engineer testified as to the manner in which it was prepared and the basis for his certification. It is apparent that it was prepared in the regular course of business and admissible under the Uniform Business Records Act of 1939. The certificate certified that the sewer system was completed as of January 2, 1952, and was introduced for the purpose of supporting the plaintiff's allegation that the sewer system was completed prior to March 5, 1954. Even without the certificate, the testimony of the Consulting Engineer clearly established that point.

We have already discussed the objection concerning the evidence relating to the adjoining vacant lot and find no error in refusing to strike out that evidence.

The last three reasons assigned can be discussed together. They relate to certain allegations pleaded by defendants under New Matter averring the circumstances leading to the enactment of Ordinance No. 321 and the purpose for which it was enacted and also the manner in which it is being enforced. Defendants offered to read the paragraphs into evidence as admissions and plaintiff objected on the ground that they were irrelevant and immaterial. The Court properly sustained the objection because the paragraphs are clearly and completely irrelevant and immaterial to the issue of this case, and the test to be applied is relevance to the issue. Queen City Studios v. Rosenzweig, 27 Sch. Leg. Rec. 298.

Even if these paragraphs had been admitted, they could have had no bearing on the issue to be determined by the jury and the outcome of the case, and therefore, the defendants were not prejudiced in any way. The motion for a new trial is overruled.

AND NOW, January 12, 1959, the defendants' motions for judgment non obstante veredicto and for a new trial are overruled and judgment is directed to be entered upon the verdict.

By the Court,
CURRAN, J.

AND NOW, January 12, 1959, upon motion of counsel for defendants, an exception is noted.

By the Court,
CURRAN, J.

DALTON, J., did not participate in the above Opinion.

APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 339

Borough of Schuylkill Haven	No. 192,
v.	October
Oscar R. Bolton and Lilly Bolton,	Term,
Appellants.	1959.

Appeal from Judgment of the Court of Common Pleas of Schuylkill County dated January 29, 1959, at No. 654 September Term, 1954.

OPINION BY WRIGHT, J.

Filed: August 10, 1959.

We are here concerned with an action by the Borough of Schuylkill Haven against Oscar R. Bolton and Lilly Bolton to recover a penalty imposed by Ordinance No. 321 requiring owners of improved property to connect with the sewer system. The borough obtained judgment before a justice of the peace, and the Boltons appealed to the court of common pleas. That tribunal dismissed the complaint for want of jurisdiction, and we reversed on appeal. See Schuylkill Haven Borough v. Bolton, 181 Pa. Superior Ct. 364, 124 A. 2d 485. The case then proceeded to trial, and the jury returned a verdict in favor of the borough. Motions filed by the Boltons for a new trial and for judgment n. o. v. were overruled by

the court en banc, and judgment was entered on the verdict. This appeal followed.

Appellants' first contention is that there was a fatal variance between the pleadings and the proof. Paragraph 3 of the second amended complaint avers that appellants "are the owners of a certain lot and house situate thereon, known as No. 309 St. Peter Street . . . which lot or piece of ground is more particularly described in Deed, recorded in the Office for the Recording of Deeds in and for the County of Schuylkill in Deed Book No. 623, page 27, which by reference thereto is made a part hereof." The sewer lateral actually extended to the curb of a lot described in Deed Book 976, page 32, which was a fifteen foot strip of land adjoining the lot first mentioned. The record clearly discloses that the two lots were used by appellants as one property. Furthermore, appellants indicated where the lateral should be placed or, at the very least, acquiesced in its location. The spot selected was marked with green paint at the curb, which mark was still visible at the time of trial and was observed by the jury. Any possible question in this regard was resolved by appellants' stipulation at the pre-trial conference.[1] While appellants later ob-

[1] "It is agreed, as to Paragraph 3 of the complaint, that the defendants are the owners of real estate situate in the Borough of Schuylkill Haven, by virtue of a deed dated October 5, 1940, and recorded in the office for the recording of deeds in and for the County of Schuylkill in Deed Book No. 623, page 27, and that they are the owners of an adjoining piece of property by virtue of a deed dated July 21, 1950, and recorded

jected to the admission of this stipulation on the ground that it was irrelevant and incompetent, the court below properly declined to countenance the attempted repudiation.

Appellants cite several cases for the proposition that the proof must conform to the facts alleged, among them Aland v. P-G Publishing Co., 337 Pa. 259, 10 A. 2d 5, which holds that pleadings and proof must conform sufficiently to enable a defendant to meet at trial the same cause of action disclosed by the complaint. This rule is based on the sound reason that a defendant should not be taken by surprise at trial by being called upon to defend against matters of which he had no notice in the pleadings, or against a different cause of action. However, there need be only substantial conformity between what is alleged and what is proved: Stuart v. Scharff, 178 Pa. Superior Ct. 629, 114 A. 2d 86; Smith v. Sheraden Bank, 178 Pa. Superior Ct. 621, 116 A. 2d 346. We are all of the opinion that the proof offered at the trial in the case at bar substantially conformed to the allegations of the complaint. In view of the lengthy and involved pro-

in the office for the recording of deeds in and for the County of Schuylkill in Deed Book No. 796, page 32. It is further agreed that the premises described in said two deeds are the premises known as 309 Saint Peter Street in the Borough of Schuylkill Haven.

"It is further agreed that there is a house on the above described land occupied by the defendants, Oscar R. Bolton and Lilly Bolton, and that house is known as 309 Saint Peter Street."

cedural history of the instant matter, see Schuylkill Haven Borough v. Bolton, supra, 181 Pa. Superior Ct. 364, 124 A. 2d 485, it is difficult to believe that appellants were in any way surprised, or called upon to defend a cause of action of which they were not fully informed before going to trial. They could not fail to be aware of the petition of the borough that a lateral had been laid to the curb line of 309 St. Peter Street, which was an improved property comprised of two lots owned and used by appellants as one.

Appellants' second and third contentions may be treated together and are as follows: "II. The compulsory connection provisions of Ordinance No. 321 are inconsistent with, and were repealed by, Ordinance No. 333. III. A borough has no power to compel a citizen to sign a contract or to punish failure to do an act forbidden to be done unless such contract is signed. Such action is a denial of due process of law and freedom of speech."

Ordinance No. 321, adopted April 4, 1950, requires owners of improved property to connect with the sewer system within three months after notice. As a penalty for failure to comply with the ordinance and for the violation of any of its provisions, a fine of $30.00 is prescribed. It was under said ordinance that the present action was instituted. Appellant argues that the compulsion feature of this ordinance is irreconcilable with the "contractual consent" required by Ordinance

No. 333, adopted October 8, 1951. Section 1 of the later ordinance provides: "Before any connection shall be made by any property owner to any Schuylkill Haven Sanitary Sewer, permission to connect to the sewer in the abutting or adjoining street, alley or other public highway shall be obtained and a contract for sewer service signed. The sewer connection permit and the contract for sewer service shall be issued to the porperty onlv upon application to the office of the Borough Utilities in the Borough Hall." Substantially the same question was disposed of by the court below in overruling appellants' demurrer to the original complaint, and we quote with approval the following excerpt from the well-considered opinion which Judge Curran filed in that connection: "Viewing the two ordinances in the light of the rules and guides above referred to, we cannot conclude that the Borough Council intended on the one hand to require property owners to connect with the sewerage system when available, and on the other forbid them from connecting to the sewer system. We believe the latter ordinance to be regulatory only and under its provisions the Borough officials of Schuylkill Haven could not refuse permission to connect, or refuse to enter into a service contract with any property owner who complied with the regulations of the ordinance."

In Purcell v. City of Altoona, 364 Pa. 396, 72 A. 2d 93, it was held that a municipal corporation, when exerting its function for the general good, is not to be shorn of its powers by mere

implication. The language used must be considered in a sense which harmonizes with and gives effect to the subject matter and general purpose and object sought to be achieved by the ordinance: Cloverleaf Trailer Sales Co. v. Borough of Pleasant Hills, 366 Pa. 116, 76 A. 2d 872. Any doubt with regard to the construction of an ordinance must be resolved in favor of its validity: Whitpain Township v. Bodine, 372 Pa. 509, 94 A. 2d 737. The "contract" mentioned in Ordinance No. 333 is in the nature of a registration, much the same as the "license" in Sterling v. City of Philadelphia, 373 Pa. 538, 106 A. 2d 793. There it was held that a license fee was simply "a registration charge,—a mere procedural device to establish the identity of those" subject to the Philadelphia mercantile tax. So far as appellants' constitutional arguments are concerned, the plain fact is that the borough was compelled to erect the sewage disposal system by order of the Pennsylvania Sanitary Water Board acting under the mandate of the Pure Streams Act.[2] The constitutionality of this statute has been upheld in a number of cases. See Commonwealth ex rel. Shumaker v. N. Y. & Pa. Co., 367 Pa. 40, 79 A. 2d 439; Evans v. Norriton Twp. Mun. Auth., 370 Pa. 150, 87 A. 2d 474; Commonwealth ex rel. Woodside v. Brigeport Boro, 378 Pa. 406, 106 A. 2d 615; Commonwealth v. Sonneborn, 164 Pa. Superior Ct. 493, 66 A. 2d 594.

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[2] Act of June 22, 1937, P. L. 1987, 35 P. S. 691.1, et seq.

Appellants' fourth contention is that a borough may not use its police power for the admitted purpose of raising revenue. Their position is that, because the lease from the authority provided that the borough would compel the abutting owners to connect with the sewer and pay the rents needed to amortize the bond issue, Ordinance No. 321 is a revenue raising measure. "It is the commonest exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith and this duty may be enforced by criminal penalties. . . . It may be that an arbitrary exercise of the power could be restrained but it would have to palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health": Hutchison v. City of Valdosta, 227 U.S. 303, 57 L. Ed. 520, 33 Sup. Ct. 290. We do not understand appellants' to question the reasonableness of the sewer rentals: Their argument is directed solely to the proposition that the charging of such rentals is "a flagrant abuse of the police power" because it thereby raises revenue. While it is true that a legislative enactment designed solely or even principally for the purpose of producing revenue cannot be justified as a valid exercise of the police power, Putney v. Township of Abington, 176 Pa. Superior Ct. 463, 108 A. 2d 134, a complete answer to appellants' contention is found in Section 1 and 2 of the Act of July 18, 1935, P.L. 1286, as amended, 53 P.S. 2231 and 2232. This legislation specifically empowers the collection

of a sewer charge in a sum sufficient to maintain the sewer system, and amortize the indebtedness incurred. In the light of this statutory provision, and in the absence of any proof or claim that the rates charged in Schuylkill Haven Borough exceed the charges authorized by the statute, appellants' contention is devoid of merit.

Appellants' fifth and final contention is as follows: "The ordinance is unequally enforced as a matter of official policy, and for an improper purpose, thus denying equal protection of the law." This contention is based on the admitted fact that sewer charges are presently being paid by some 219 owners whose properties are actually not connected with the sewer system. This admission by the appellee was part of a stipulation which further set forth that the policy of withholding legal action against such property owners was dependent upon the final disposition of actions which had been brought against wholly uncooperative property owners. In view of the fact that the instant proceeding has been before the courts since 1953, it is understandable that the borough would not desire to process 219 additional cases through the same series of legal hurdles. The present action was instituted in the nature of a test case, and it is asserted in appellee's brief that counsel for appellants agreed that other legal actions should be withheld pending the outcome of the instant proceeding. There is no showing that the borough has relinquished its rights against the non-cooperating property

owners, or that the present action differs in any way from the remedy provided for by Ordinance No. 321 in the event of refusal to connect with the sewer system. Our conclusion is that appellants have not been denied equal protection of the law.

Judgment affirmed.

APPENDIX B

ORDINANCE NO. 321

SECTION 2. As the sewer system is constructed and sewer service becomes available, each and every owner of improved property in the Borough of Schuylkill Haven abutting on or adjoining any street, alley, lane or other public highway in which there is a sewer, is hereby required to connect his, her or its premises with the Sewer System but only upon receipt of due notice from the Borough to so connect.

SECTION 5. If after the expiration of three (3) months from the date of the notice given pursuant to Section 2 or Section (3) of this ordinance, any owner shall have failed to connect his, her or its property with the Sewer System as required by Section 2 or Section 3, such failure shall be and is hereby declared a violation of this ordinance.

SECTION 10. Any person, firm or corporation violating any of the provisions of this ordinance shall, upon conviction before any Justice of the Peace residing in Schuylkill County, Pennsylvania, pay a fine not exceeding Thirty ($30.00) Dollars, and costs of prosecution, and in default thereof, shall undergo imprisonment in the County Jail at Pottsville, Pennsylvania, for not more than thirty (30) days. Each and every month that the provisions of this ordinance shall be violated, shall be deemed to constitute a separate offense with a like penalty.

APPENDIX B

ORDINANCE NO. 333

SECTION I. Before any connection shall be made by any property owner to any Schuylkill Haven Sanitary Sewer, permission to connect to the sewer in the abutting or adjoining street, alley or other public highway shall be obtained and a contract for sewer service signed. The sewer connection permit and the contract for sewer service shall be issued to the property only upon application to the office of the Borough Utilities in the Borough Hall.

SECTION II. No Sewer connection permit will be issued by the Borough and no connection shall be made with any sewer until the connection charge has been paid in accordance with Borough Ordinance No. 322, and the following schedule:

CONNECTION CHARGES

Residential connections	
6 inches or less	$50.00
Commercial connections	
6 inches or less	50.00
Industrial connections	
6 inches or less	50.00
8 inch connections	75.00
10 inch connections	100.00
Connections larger than 10 inches —to be fixed by the Borough, but not less than	100.00

Connection charges for connections made to the sewerage system during any calendar year after the end of the second calendar year following that in which sewer service becomes available will be charged in accordance with the above schedule of connection fees, plus a surcharge of ten ($10.00) dollars per year for each year or fraction thereof that has elapsed since the end of said second calendar year, provided that the total amount of such surcharge shall not exceed one hundred ($100.00) dollars.

SECTION IV. Sewer rentals will be two hundred (200%) per cent of amount charged for water supplied during the quarter. Uncontaminated water used solely for cooling purposes shall be excluded from the sewerage system, and the Borough may allow a deduction from metered consumption, in respect of such water so excluded, for purposes of billing sewer rentals. Sewer rentals will start on the date connection is made to the sewer system.

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JAMES B. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 691

OSCAR R. BOLTON and LILLY BOLTON,
Appellants.

v.

BOROUGH OF SCHUYLKILL HAVEN,
Appellee.

On Appeal From the Superior Court of Pennsylvania.

MOTION TO DISMISS APPEAL

CALVIN J. FRIEDBERG,
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February 27, 1961.

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sewer rentals, charges and connection fees, which, in the aggregate, were deemed to be sufficient to pay the fixed rental to the Authority and to pay the cost of operation, repair, and maintenance of the sewer system and sewage treatment plant.

In order to fulfill the mandate of the Sanitary Water Board of the Commonwealth of Pennsylvania, the Borough adopted Ordinance No. 321 on April 4, 1950, whereby privies, cesspools, and septic tanks were prohibited within the Borough and also barred the discharge of any sewage into the waters of the Commonwealth (Transcript, p. 18). The ordinance further provided that all properties within the Borough must be connected to the sewerage system after three months' notice to do so under a penalty of thirty ($30.00) dollars fine. Appellants were duly notified to connect to the sewerage system (Transcript, p. 19) but failed to do so and a suit was instituted by the Borough against the within appellants in September, 1954, for the collection of the penalty. After jury trial, a verdict in favor of the plaintiff Borough was duly entered in the Court of Common Pleas of Schuylkill County and judgment entered thereon. Motion for judgment n. o. v. and a new trial were refused by the trial court, and the Superior Court of Pennsylvania affirmed the judgment on August 10, 1959. Four petitions for allocatur to the Supreme Court of Pennsylvania were refused and notice of appeal was subsequently lodged with your Honorable Court.

MOTION TO DISMISS UNDER SUPREME COURT RULE 16 (1) (b).

A. THE QUESTIONS PRESENTED BY APPELLANTS DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

Ordinance No. 321 of the Borough of Schuylkill Haven (Transcript, p. 18) is the ordinance under which appellants were sued, and it clearly sets forth in its preamble that the purpose to be accomplished thereby was to "promote the health, safety and welfare of the people of the Borough of Schuylkill Haven and of the Commonwealth of Pennsylvania, and the purity of its streams . . . ." This type of ordinance is a common and increasingly necessary exercise of the police power of a municipality and its enforcement is essential to public health. HUTCHINSON v. CITY OF VALDOSTA, 227 U. S. 303, 57 L. Ed. 520. The duty of connection to a sanitary sewer system may be enforced by criminal penalties. DISTRICT OF COLUMBIA v. BROOKE, 214 U. S. 138, 53 L. Ed. 941, 29 Sup. Ct. Rep. 560; NOURSE v. RUSSELLVILLE, 257 Ky. 5.

The fact that Ordinance No. 321, in conjunction with Ordinance No. 333, fixes certain charges and penalties upon those who, voluntarily or involuntarily use the system, does not render the ordinances unconstitutional unless the legislative enactments are designed for the sole purpose of

raising revenue, or the rates charged for the service be unreasonable. There is no contention that the rates and charges are exorbitant or unreasonable. The complaint seems to be that because the two ordinances do impose rentals, they are a flagrant abuse of the police power and therefore violate the 14th Amendment to the Constitution of the United States. It is neither the sole nor primary object of this ordinance to raise revenue. Its sole purpose is to protect the health of the citizens of the Borough by barring privies, cesspools and septic tanks and replacing them by a sanitary sewer system and sewerage treatment plant. Rates and rentals must, of course, be charged for the proper operation and maintenance of the sewer system and for the payment of the debt service charges. The Act of the General Assembly of the Commonwealth of Pennsylvania of July 18, 1935, P. L. 1286, as amended, (53 Purdon's Statutes, Sec. 2231 and 2232) specifically empowers the collection of sewer charges sufficient to maintain the system and amortize the bonded indebtedness. The constitutionality of that Act is not questioned in these proceedings.

Furthermore, the Borough was compelled to construct and maintain the sewer system and sewerage treatment plant by the mandate of the Sanitary Water Board of the Commonwealth of Pennsylvania, under the Pure Streams Act of June 22, 1937, P. L. 1987 (35 Purdon's Statutes, Sec. 691.1, et seq). The constitutionality of that statute has been judicially determined in a num-

ber of cases. See EVANS v. NORRITON TWP. MUNICIPAL AUTHORITY, 370 Pa. 150, 87 Atl. 2nd 474; COMMONWEALTH, EX REL SHUMAKER v. N. Y. AND PA. CO., 367 Pa. 40, 79 Atl. 2nd 439; COMMONWEALTH, EX REL WOODSIDE v. BRIDGEPORT BOROUGH, 378 Pa. 406, 106 Atl. 2nd 615; COMMONWEALTH v. SONNEBORN, 164 Pa. Sup. 493; 60 Atl. 2nd 594.

The contention that Ordinance No. 333 requiring the signing of a contract for sewer services before connection to the sewer is permitted, is violative of the 13th Amendment because Ordinance No. 321 makes connection to the sewer system compulsory, is arrived at by strained reasoning and tortuous argument. The former ordinance is regulatory only and permission to connect cannot be refused to any who desire the service, provided they comply in all other respects with the ordinance. STERLING v. CITY OF PHILA., 373 Pa. 538, 106 Atl. 2nd 793. The latter ordinance makes it a violation to refuse to connect after notice so to do but does not bar or prohibit voluntary connection. Due process, liberty of contract or freedom of speech are not involved.

Appellants have failed to meet the burden of establishing the unconstitutionality of the ordinances, much less have they overcome the presumption of constitutionality prevailing in all legislative enactments. LOOMIS v. BOARD OF EDUCATION, 376 Pa. 428; ENGLISH v. SCHOOL

DISTRICT OF ROBINSON TWP., 358 Pa. 45; HOTEL CASEY v. ROSS, 343 Pa. 573; CAVANAUGH v. GELDER, 364 Pa. 361; HENDERSON BRIDGE CO. v. CITY OF HENDERSON, 173 U. S. 592, 43 L. Ed. 823.

The questions presented by appellants do not raise a new, real and substantial Federal question. BLUMENSTOCK BROS. v. CURTIS PUBL. CO., 252 U. S. 436; ZUCHT v. KING, 260 U. S. 174, 67 L. Ed. 194. They are mere assertions, frivolous in nature, palpably without foundation or support in reason. See McCAIN v. DES MOINES, 174 U. S. 168, 43 L. Ed. 936; CONN v. RINGER, 32 Fed. 2nd 639.

The appeal should therefore be dismissed because a substantial Federal question is not fairly and reasonably involved.

B. THE APPEAL SHOULD BE DISMISSED UNDER SUPREME COURT RULE 16 (1) (a) BECAUSE NOT TAKEN IN CONFORMITY WITH RULE 13 (1).

Notice of appeal to your Honorable Court was lodged February 23, 1960, and on April 20, 1960, appellants secured from the Honorable Chief Justice Jones of the Supreme Court of Pennsylvania an order enlarging the time for perfecting the appeal to this court, "until the expiration of sixty days from the date of final determination by the Supreme Court of Pennsylvania of the jurisdictional validity of the judgment of the Superior Court appealed from." On April 20, 1960, the appellants requested the Superior Court of Pennsylvania to vacate its judgment which was refused by said court on April 26, 1960. On June 9, 1960, appellants petitioned the Supreme Court of Pennsylvania for an allocatur from the refusal of the Superior Court of Pennsylvania to vacate its judgment which was denied on June 20, 1960. On August 1, 1960, appellants again petitioned the Supreme Court of Pennsylvania to reconsider its previous refusal of an allocatur which was again disallowed per curiam on September 30, 1960. On the 60th day following the last refusal, November 29, 1960, appellants again petitioned the Supreme Court of Pennsylvania for clarification and reconsideration of its last refusal of an allocatur which was again dismissed per curiam on December 6, 1960.

Motion to Dismiss Appeal

On December 17, 1960, the appellee Borough petitioned the Supreme Court of Pennsylvania to dismiss appellant's appeal to your Honorable Court because the same was not perfected within the time prescribed by Supreme Court Rule 13(1) which petition was dismissed by said court on January 14, 1961. On February 2, 1961, the Jurisdictional Statement was served upon appellee.

It is apparent from the above that appellants did not file their Jurisdictional Statement within the sixty-day period after the refusal of an allocatur by the Supreme Court of Pennsylvania which was first denied on June 20, 1960. Two other petitions for allocatur were subsequently filed and refused. It is the contention of the appellee that the last two petitions for allocatur were dilatory only and that the sixty-day period should have run from June 30, 1960, rather than December 6, 1960, and jurisdiction should be denied.

CONCLUSION.

The alleged Federal questions presented by appellants are not substantial and arise from the pleadings only and are mere assertions, frivolous in nature, palpably without foundation and have no support in reason, and the appeal should therefore be dismissed.

The appeal should be dismissed on the further grounds that the appeal was not perfected within the time prescribed by the Rules of your Honorable Court.

Respectfully submitted,

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February 27, 1961.

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MAR 30 1961
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In the

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 691

OSCAR R. BOLTON and LILLY BOLTON,
Appellants,

v.

BOROUGH OF SCHUYLKILL HAVEN,
Appellee.

On Appeal From the Superior Court
of Pennsylvania.

APPELLANTS' BRIEF CONTRA MOTION TO DISMISS APPEAL

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COUNTER-STATEMENT OF THE CASE.

The Appellants' Statement of the Case appears in the Jurisdictional Statement.

This counter-statement will be directed toward a few of the many inaccuracies in the Appellee's Brief:

(1) There was no allegation and no proof that the Appellee had received a "directive" from the Sanitary Water Board to construct the subject sewer system. If there was any such "directive," its contents were not made part of the record. The statement is entirely self-serving and extraneous to the record.

(2) The Borough was not only required to pay a fixed rental to the Authority, but was also obliged to pay all net revenues over and above the fixed charge as "additional rental." Section 2.04 (4) of the Contract and Lease so provides.

(3) Ordinance No. 321 was *not* adopted "to fulfill the mandate of the Sanitary Water Board," as Appellee states. There is nothing in the record to support that statement. On the contrary, the record shows that Ordinance No. 321 was adopted because the Borough had made a bargain with the Authority to do so.

(4) It is *not* true, as Appellee's statement says, that Notice of Appeal was filed "subse-

quently" to the refusal of four petitions for allocatur by the Supreme Court of Pennsylvania. The fact is, that Notice of Appeal was filed within 90 days from the refusal of the *first* petition. The remaining three petitions dealt with a jurisdictional question which will be more fully discussed in Part III of the following argument.

ARGUMENT

I. THERE IS ACTUALLY NO MOTION TO DISMISS BEFORE THE COURT.

Appellants were never served with any "Motion to Dismiss Appeal." The only document ever served on them was a *Brief* which bore the quoted words on its cover. That document does not contain any Motion. All it contains is a *Brief of Argument* in support of an alleged Motion. Furthermore, we are informed by counsel for Appellee that no Motion, as distinguished from the supporting Brief, was ever filed with the Clerk of the Court.

Rule 35 (1) of this Court provides:

> "Every motion to the Court shall state clearly its object and the facts on which it is based. A brief in support of the Motion (other than motions under Rule 31) may be filed therewith."

Thus, Rule 35 (1) itself points out the clear distinction between a "motion" and "A brief in support of the motion."

Furthermore, Rule 35 (2) provides:

> "Motions to the Court shall be filed with the clerk, with proof of service unless *ex parte* in nature."

We repeat, no "Motion to Dismiss Appeal," as

distinguished from a supporting Brief, was ever filed or served.

Consequently, Appellants are now in the peculiar position of being required to answer a Brief in support of an alleged Motion which was never served and which was never filed.

There is actually nothing before the Court, in the absence of a Motion properly served and filed. *The Brief of the Appellee should be stricken from the record.*

II. THE FEDERAL QUESTIONS ARE REAL AND SUBSTANTIAL, AND ARE NOT FORECLOSED BY ANY PRIOR DECISION OF THIS COURT.

A. The Stipulations of Record Squarely Admit That Ordinance No. 321 Was Adopted Pursuant to a Bargain With a Third Party and For the Financial Benefit of the Third Party.

The Appellee concedes in its argument that Ordinance No. 321 is invalid if it was adopted for the purpose of raising revenue. But the Appellee then proceeds to ignore, and tacitly repudiate, the solemn Stipulations made of record, which plainly admit the revenue-raising purpose.

Those stipulations were made at pre-trial conference (Transcript, pp. 50-60), and it was subsequently directed at trial that "the facts, as stipulated, shall be placed upon the record as to the verity and existence of the conditions" (Transcript, p. 66), and further, that the stipulations "would therefore raise the legal questions which are paramount in the issue here involved." (Transcript, p. 66).

We call the Court's attention to the following pertinent Stipulations:

"MR. STUTZMAN: Paragraph 14 of the New Matter: *'For the purpose of raising money sufficient to pay off the principal and interest of the Authority's Revenue Bonds* and sufficient

to pay the cost of operating and maintaining the Sewer System, the Authority and the Borough, and their respective officers and agents; by ordinances, compelled owners of abutting improved property to pay the cost of constructing, maintaining and operating the Sewer System *requiring said owners to connect their properties to said Sewer System* and compelling said owners to pay connection charges and sewer rentals under the penalties imposed by the ordinances'." (Transcript, p. 52)

* * * * *

"17. Under the provisions of Section 2.08 of said Contract and Lease (Plaintiff's Exhibit No. 1), *the Borough further agreed to require all owners of abutting improved property within the Borough to connect with the said Sewer System* and, in the event of the failure of any such property owner to pay any connection charge or sewer rent within a reasonable time, to the municipal liens therefor and to proceed to the collection thereof.

Paragraph 17 of the reply: 'Admitted'."
(Transcript, p. 54)

"18. The Borough's undertaking to compel connections with the Sewer System, as set forth in Section 2.08 of said Contract and Lease (Plaintiff's Exhibit No. 1), was agreed to by the Borough and the Authority *for the specific purpose and with the specific intent* of assuring the Authority and the holders of the Authority's bonds that the owners of abutting improved property would be compelled to pay sewer rentals and to contribute to the cost of constructing, maintaining and operating the

Sewer System *regardless of said owners' consent or desire to receive service provided by said Sewer System.*

Paragraph 18 of the reply: 'Admitted'."

(Transcript, p. 54)

* * * *

"20. Pursuant to and with intent to comply with Section 2.08 of said Contract and Lease (Plaintiff's Exhibit No. 1) *and with intent to execute the purpose of said Section 2.08 as hereinbefore alleged in paragraph 18 hereof, the Borough enacted its said Ordinance No. 321 (Plaintiff's Exhibit No. 3)* approved April 4, 1950, *requiring owners of improved property abutting on or adjoining said Sewer System to connect therewith, after due notice from the Borough to so connect,* under penalty of fine or imprisonment, and further forbidding said owners to dispose of their sewage by any other means, including the use of septic tanks."

(Transcript, p. 55)

The foregoing stipulations show clearly, unequivocally and beyond any possibility of denial that the Borough made a bargain with the lessor of the sewer to adopt Ordinance No. 321 and that *the Ordinance was adopted for the direct, immediate and primary purpose of taking the money of the abutting property owners without their consent and applying that money to the payment of the lessor's bonds.* The Appellee cannot be allowed to repudiate those stipulations.

B. The Stipulations and the Record Further Show That the Borough Requires the Property Owner to Express Contractual Consent Under Penalty of Fine or Imprisonment.

On this point, we call the Court's attention to the following further stipulation:

"Despite the provisions of Section VI of Ordinance No. 333, (Plaintiff's Exhibit No. 4) repealing all ordinances or parts of ordinances inconsistent with said Ordinance No. 333, the officers and councilmen of the Borough have continued to assert power, under Ordinance No. 321, (Plaintiff's Exhibit No. 3) to compel the owners of improved property abutting on said Sewer System to connect their properties to said System against their will and to accept the sewer services provided thereby, under penalty of fine or imprisonment, and said officers and councilmen have asserted and do assert power at the same time, under Ordinance No. 333, to prevent and forbid the property owner from complying with Ordinance No. 321, unless he first signs a contract to receive and pay for sewer service, as provided by Ordinance No. 333.

"Paragraph 23 of the reply: 'Admitted. For further answer it is averred that there is no inconsistency or incompatability between Ordinance No. 321 (Plaintiff's Exhibit No. 3) and Ordinance No. 333 (Plaintiff's Exhibit No. 4), nor in the respective requirements of each ordinance referred to in paragraph 23 of the answer'." (Transcript, pp. 56-57).

We further call the Court's attention to the form of Contract which the borough requires every property owner to sign; which was produced in Court by the Borough Solicitor (Transcript, p. 62); and which appears in the record as Deft's Exhibit No. 2. (Transcript, p. 78):

"Contract For Sewerage Service
Schuylkill Haven Borough
Schuylkill Haven, Pa.

Date 19

The Borough will extend its facilities and furnish service to the undersigned at premises located at said service used to be under rates.

Property owner shall pay for such service in accordance with rules, regulations, and rate schedules adopted by the Borough Council, or filed with the Public Utility Commission.

This contract shall became effective when signed by

Owner

Rep. of Sch. Haven Borough."

The document purports upon its face to be a "Contract." It contains contractual promises by both parties, and it must be signed by both parties before it becomes effective.

It should be noted that the "Contract" is entirely separate and distinct from the "Permit."

which appears in the record as Defendant's Exhibit No. 1 (Transcript, p. 77).

Thus, it clearly appears that the combined effect of Ordinances No. 321 and 333, and the administrative practice of the Borough, is to place the property owner in a dilemma. *Either he must relinquish his Constitutional rights to liberty of contract and freedom of speech by expressing contractual consent under duress of fine or imprisonment, or, if he stands upon his Constitutional rights and refuses to express contractual consent, he is not allowed to connect, and yet he is punished by fine or imprisonment for failure to connect.* Compare **WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE**, 319 U. S. 624, 630-631; 87 L. Ed. 1628, 1633.

C. The Federal Questions Are Not Foreclosed By Any Prior Decision of This Court.

None of the sewer connection cases cited by the Appellee have any relevance to, or bearing upon, the Constitutional questions arising from the admitted facts of the present case. There was nothing in the record of any of the cases cited by the Appellee to show that the legislation in question was adopted for any ulterior purpose.

In the present case, we have a flat and unqualified admission of the ulterior purpose. Furthermore, in the present case, we have the added element that the property owner is compelled, *under*

duress, to express *contractual consent* to a transaction forced upon him.

D. This Case Presents Real and Substantial Constitutional Questions of Due Process, Liberty of Contract and Freedom of Speech.

The admitted and stipulated facts show a bargain by a municipality to use its police power for the financial benefit of the other party to the bargain. The admitted and stipulated facts also show that Ordinance No. 321 was adopted "for the specific purpose" of taking the money of the abutting owners without their consent and applying it to the payment of the third party's debt.

This is a clear violation of the Due Process Clause of the Fourteenth Amendment. It is plain abuse of the police power. It is a plain attempt to use the police power as a guise for taking one man's property, without resort to the power of taxation, and giving it to another. As was aptly said by the Supreme Court of Pennsylvania in **WATERS v. WOLFE**, 162 Pa. 153, 172:

> ". . . that it (a legislative body) may not take one man's property to pay the debt of another against the consent of the owner, is . . . well settled."

The Appellee relies on the Pennsylvania Act of July 18, 1935, P.L. 1286, as amended by the Act of May 14, 1937, P.L. 630 (53 Purdon's Statutes, Section 2231 and 2232). But the Appellee fails to inform this Court that in **HAMILTON'S AP-**

PEAL, 340 Pa. 17, 16 A. 2d 32, the Supreme Court of Pennsylvania construed that very statute to mean exactly the opposite of Appellee's contention here. In **HAMILTON'S APPEAL**, the Court held that the charges authorized by the statute were *contractual* obligations, arising out of the express or implied *consent* of the property owner to use the sewer; that the statute did not authorize charges in the nature of taxes or as a substitute for taxes; and that if the charges were imposed *in invitum* they could not be sustained as contractual obligations.

It is very likely that it was this decision in HAMILTON'S APPEAL, *supra*, which prompted the Appellee to attempt to give some color of legality to its charges by forcing the property owner, *under duress of fine or imprisonment*, to sign a purported "Contract" expressing contractual consent to their payment.

This is a clear violation of liberty of contract. It is also a clear violation of a citizen's right to refuse to speak what is *not* in his mind: **WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE**, 319 U. S. 624, 633-634; 87 L. Ed. 1628, 1635.

Until this case arose, no American Court had ever held that legislative power could force a man *to express contractual consent against his will.* This requirement, contained in Ordinance No. 333 and insisted upon by the administrative practice of the Appellee, is an *unconstitutional*

clog upon the duty of connection imposed by Ordinance No. 321. Neither a State, nor an agency of a State, may impose conditions which require the relinquishment of rights protected by the Federal Constitution. **FROST v. RAILROAD COMMISSION**, 271 U. S. 583, 594, 70 L. Ed. 1101, 1105.

This Court has never hesitated to denounce the use of State legislative power as an instrument for circumventing Federal Constitutional rights, when the facts of the case made such purpose evident: **DOBBINS v. CITY OF LOS ANGELES**, 195 U. S. 223, 49 L. 169; **GOMILLION v. LIGHT FOOT**, —U. S.—, 5 L. Ed. 2d 110, 117.

Under the stipulated facts of this case, that is precisely the situation here, both as to the use of the police power as a guise for raising revenue for the benefit of a third party, and the further attempt to force a citizen *to express contractual consent under compulsion.*

III. RULE 13 (4) WAS STRICTLY COMPLIED WITH.

The judgment of the Superior Court of Pennsylvania was entered on August 10, 1959. Petition for Allocatur was presented to the Supreme Court of Pennsylvania on August 31, 1959, and refused by that Court on November 25, 1959. Notice of Appeal to this Court was filed on February 23, 1960. The timeliness of that Notice of Appeal has not been questioned.

Thereafter, the Superior Court of Pennsylvania decided in **COM. v. HANZLIK**, 191 Pa. Superior Ct. 460, 157 A. 2d 97, that it never had jurisdiction to review cases of the class to which the present case belongs.

That decision, of course, cast grave doubt on the jurisdictional validity of the judgment of the Superior Court in the present case. Accordingly, on April 20, 1960, Appellants petitioned the Superior Court to vacate its judgment for want of jurisdiction. On the same date, April 20, 1960, within the 60-day period permitted by Rule 13 (1), Appellants secured from Chief Justice Jones of the Supreme Court of Pennsylvania, where the record was lodged, an Order enlarging the time to perfect the appeal to this Court, "until the expiration of sixty days from the date of final determination by the Supreme Court of Pennsylvania of the jurisdictional validity of the judgment of the Superior Court appealed from."

On April 26, 1960, the Superior Court refused to vacate its judgment. On June 9, 1960, Appellants petitioned the Supreme Court of Pennsylvania for allocatur from that refusal of the Superior Court to vacate its judgment. The Supreme Court of Pennsylvania denied that petition, without opinion, on June 30, 1960. Two further efforts were made, on July 28, 1960, and on November 28, 1960, to have the Supreme Court of Pennsylvania make a definite ruling on the jurisdictional question. Those petitions were denied, again without an opinion, on September 30, 1960, and December 6, 1960. On February 3, 1961, the Jurisdictional Statement and Transcript of Record were filed in this Court.

The Order of Enlargement signed by Chief Justice Jones expressly granted "sixty days from the date of final determination by the Supreme Court of Pennsylvania of the jurisdictional validity of the judgment of the Superior Court appealed from." *The Supreme Court of Pennsylvania has never made any determination of the jurisdictional question.* In fact, the Supreme Court of Pennsylvania has *squarely recognized* that it had *never* decided the jurisdictional question, for, on January 14, 1961, that Court *denied* the Appellee's Petition to Dismiss Appeal to the United States Supreme Court, which raised the very same contention that Appellee advances here.

If the Appellee was dissatisfied with the refusal of its Petition, it had a remedy under Rule 14(3),

which it failed to follow. See **UNITED PUBLIC WORKERS v. MITCHELL**, 330 U. S. 75, 91 L. Ed. 754, which further holds that Rule 13 (1) is not jurisdictional. Be that as it may, the appeal in the present case was perfected within the time permitted by the Order of Enlargement, and therefore within the time permitted by Rule 13 (1).

CONCLUSION

(1) There is no "Motion to Dismiss Appeal" actually pending before this Court.

(2) The Federal Constitutional Questions squarely arise out of the facts stipulated of record. The questions are real and substantial, and have never been adversely decided by this Court.

(3) Rule 13 (1) was strictly complied with.

Appellants respectfully request your Honorable Court to hear this Appeal.

Respectfully submitted,

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March 24, 1961.